But both the theories of mistake and implied condition are applicable to the principal case, where the performance was rendered impossible by a change in foreign law. Both parties contemplated that the contract should be carried out in a foreign country. In the absence of an express provision to the contrary,[13] it can, therefore, be assumed that the parties contemplated that the transactions in foreign parts should be legal.[14] And it is further true that the legality of the transaction is just as much a means of performance as the ship that carried the cargo. If foreign law, then, renders performance of the contract illegal, the contemplated means of performance are gone and both parties should be excused.

There seems, therefore, every reason to support the principal case. It apparently overrules the well-known decision of *Jacobs* v. *Credit Lyonnais*.[15] The court attempts to distinguish the two on the ground that the impossibility in the latter case may have been due to a foreign war. But the principles outlined above should apply equally to either case, for whether the impossibility is due to a war or a change in foreign law, the contemplated basis of the contract is destroyed.

COMPULSORY REFERENCE IN ACTIONS AT LAW. — The term "compulsory reference" is ordinarily used to denote the act of a court in sending a pending cause, without the consent of one or more of the parties thereto, to a referee for examination and decision.[1] Under this procedure a jury is dispensed with and the hearing before the referee replaces a trial in court, judgment being entered or a decree made in accordance with the referee's report if it be accepted by the court.[2] As thus defined, compulsory reference has a very limited application in actions at law.[3]

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the view of the civil law, which is much less strict. See FRENCH CIVIL CODE, 1148; ITALIAN CIVIL CODE, 1226. There the promisee is excused if he cannot perform the contract because of *vis major* or fortuitous accident.

[13] The promisor can expressly contract to assume the risk of impossibility or destruction of the subject matter or means of performance. Finney *v.* Bennett, 49 Misc. 230, 97 N. Y. Supp. 291; Berg *v.* Erickson, 234 Fed. 817 (1916). See the well-known *dictum* of Maule, J., in Canham *v.* Barry, 15 C. B. 597, 619 (1855), "A man may, if he chooses, covenant that it shall rain to-morrow."

[14] Probably this particular thought would not occur to the parties, but if nothing appeared to the contrary, it would be bound up in their whole conception of the transaction. See 1 COL. L. REV. 529, 533; 15 HARV. L. REV. 418.

[15] 12 Q. B. D. 589 (1884). It is not clear from the case whether there was an actual illegality or merely a war. See Scrutton, L. J., in Ralli Bros. *v.* Compañia Naviera Sota y Aznar, *supra*, 301.

[1] See cases, note 3, *infra*.

[2] See cases, note 3, *infra*.

[3] The power to make such reference in actions at law does not exist at common law but is based exclusively upon statutes. Mead *v.* Walker, 17 Wis. 189 (1863).

Statutes giving this power in actions at law have usually been held to violate the right of trial by jury as guaranteed by the state constitutions. Grim *v.* Norris, 19 Cal. 140 (1861); Russell *v.* Alt, 12 Idaho, 789, 88 Pac. 416 (1907); St. Paul, etc. R. R. Co. *v.* Gardner, 19 Minn. 132 (1872); Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066 (1895); American Saw Co. *v.* First Nat. Bank, 58 N. J. L. 438, 34 Atl. 1 (1896).

In a few states statutes permitting such reference in cases involving accounts were in existence at the time when the state constitutions were adopted, and subsequent enactments have been held constitutional on this basis. Wentzville Tobacco Co. *v.*

But the term has also been used to designate the act of a court of law in referring a pending cause to an auditor to simplify the issues, hear the evidence, and report the same, with or without his opinion thereon, to the court.[4] Here the auditor acts as a preliminary tribunal and the cause is later tried in court, the report of the auditor being received as *prima facie* evidence of the facts and findings embodied therein.[5] It is clear that this latter practice was unknown to the common law,[6] and apparently it had its origin in a Massachusetts statute passed in 1817.[7] Similar power has since been given to the courts of a few other states[8] and the District of Columbia[9] in cases involving accounts. Within the last two decades the federal courts in certain districts[10] have adopted this practice in cases involving complicated questions of fact, although Congress has given them no express authority to do so.[11] Their inherent power to make such a reference without the aid of a statute has been upheld in a recent case, *In re Peterson*,[12] by the United States Supreme Court.[13]

Walker, 123 Mo. 662, 27 S. W. 639 (1894); Smith *v.* Kunert, 17 N. D. 120, 115 N. W. 76 (1907); Trummer *v.* Konrad, 32 Ore. 54, 51 Pac. 447 (1897); Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592 (1893); Dane County *v.* Dunning, 20 Wis. 210 (1866); Lee *v.* Tillotson, 24 Wend. (N. Y.) 337 (1840). See Steck *v.* Colorado Fuel and Iron Co., 142 N. Y. 236, 37 N. E. 1 (1894). See 22 HARV. L. REV. 378.

The Seventh Amendment prevents the federal courts from making such reference even in the states last named. United States *v.* Rathbone, 27 Fed. Cas. No. 16, 121, 2 Paine, 578 (1829); Howe Machine Co. *v.* Edwards, 12 Fed. Cas. No. 6, 784, 15 Blatchf. 402 (1878); Sulzer *v.* Watson, 39 Fed. 414 (1889). And Congress has passed an act expressly prohibiting this practice in the federal courts. See REV. STAT., §§ 648, 649; 1918 COMP. STAT., §§ 1584, 1587.

In England under the Arbitration Act of 1889 a compulsory reference can be made in a cause requiring any "prolonged examination of documents or accounts, or any scientific or local investigation." See 52 & 53 VICT., c. 49, § 14.

[4] See cases notes 8, 9, and 10, *infra*. Usually no distinction is made between these two fundamentally different classes of cases, both being cited under the heading "compulsory reference." To avoid confusion the terminology "compulsory reference for decision" will be used in referring to the practice illustrated by the first class of cases, and "compulsory reference for preliminary hearing" to designate the latter.

[5] See cases note 10, *infra*.

[6] See Taff Vale Ry. Co. *v.* Nixon, 1 H. L. Cas. 111, 122, 126 (1847). See C. C. Langdell, "A Brief Survey of Equity Jurisdiction," 2 HARV. L. REV. 241, 251.

[7] See 1817 MASS. STAT., c. 142. For the present statute see 1902 MASS. REV. LAWS, c. 165, § 55.

[8] See 1916 MAINE REV. STAT., c. 87, § 88; 1901 NEW HAMPSHIRE PUB. STAT., c. 227, §§ 1–8. In Rhode Island and Vermont such statutes were passed but were held unconstitutional. See note 18, *infra*.

[9] See 1919 D. C. CODE OF LAWS, c. 4, § 254. See Simmons *v.* Morrison, 13 App. D. C. 161 (1898); Lincoln *v.* Virginia Portland Cement Co., 258 Fed. 505 (1919).

[10] Fenno *v.* Primrose, 119 Fed. 801 (Mass.) (1903); Clark *v.* Craven, 186 Fed. 959 (Mass.) (1911); Vermeule *v.* Reilly, 196 Fed. 226 (N. Y.) (1912); Peterson *v.* Davison, 254 Fed. 625 (N. Y.) (1918); United States *v.* Wells, 203 Fed. 146 (Tenn.) (1913).

[11] These cases cannot be explained on the theory that the federal courts were conforming with the procedure of the state courts as provided for in REV. STAT., § 914, 1918 COMP. STAT., § 1537. In New York and Tennessee the power to refer has not been given to the state courts. In Massachusetts the federal courts could not conform on account of the Massachusetts rule as to costs. See Fenno *v.* Primrose, *supra*, 803.

[12] U. S. Sup. Ct., October Term, 1919, No. 28. See RECENT CASES, p. 338, *infra*. Three justices dissented.

[13] The court also held that a compulsory reference for a preliminary hearing did not violate the right of trial by jury as guaranteed by the Seventh Amendment. The same result has been reached under the state constitutions in Maine, Massachu-

In sanctioning this practice, the Supreme Court adopted the broad hypothesis that "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." [14] On a proposition so fundamental it would seem that there should be a wealth of authority; yet the court apparently found only one case even remotely in point.[15] Until the present instance all the important procedural changes since the adoption of the Constitution have been of statutory origin.[16] It is submitted that in *In re Peterson* is to be found a reiteration of the ancient common-law doctrine under which courts made their own rules of procedure and practice.[17] Viewed in this light the decision falls little short of being epoch-making. Its importance lies in the fact that it allows greater flexibility in the administration of justice, thus saving time and money for litigants as well as courts, and enables courts to meet new problems of procedure and practice without waiting for legislative assistance.[18] The principle upon which it rests seems sound

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setts, and New Hampshire. Holmes *v.* Hunt, 122 Mass. 505 (1877); Perkins *v.* Scott, 57 N. H. 55 (1876). See Howard *v.* Kimball, 65 Me. 308, 327 (1876). *Contra*, Francis *v.* Baker, 11 R. I. 103 (1874); Plimpton *v.* Town of Somerset, 33 Vt. 283 (1860). Statutes making an official finding or report *prima facie* evidence of the facts and finding embodied therein have repeatedly been held constitutional. Marx *v.* Hanthorn, 148 U. S. 172 (1893) (tax deed); Turpin *v.* Lemon, 187 U. S. 51 (1902) (tax deed); Reitler *v.* Harris, 223 U. S. 412 (1912) (official entry in registry of deeds); Meeker & Co. *v.* Lehigh Valley R. R. Co., 236 U. S. 412 (1914) (report of Interstate Commerce Commission). The same should be true of an order of a court.

[14] See *In re* Peterson, note 12, *supra*.

[15] Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 87–90 (1869), holding that a court of equity has inherent power to appoint "viewers" to examine a mine to estimate damages. See Heckers *v.* Fowler, 2 Wall. (U. S.) 123, 128 (1864). *Cf.* Davis *v.* St. Louis and S. F. Ry. Co., 25 Fed. 786 (1885). *Contra*, see Ackerman *v.* Union and New Haven Trust Co., 91 Conn. 501, 505, 100 Atl. 22, 24 (1917). There are many cases holding that a court has, in the absence of constitutional or legislative limitations, inherent power to make such rules as are necessary for the orderly conduct of its business. State *v.* Van Cleve, 157 Ind. 608, 62 N. E. 446 (1902); Prindeville *v.* The People, 42 Ill. 217 (1866); Brooks *v.* Boswell, 34 Mo. 474 (1864); Zeuske *v.* Zeuske, 55 Ore. 65, 105 Pac. 249 (1909); Snyder *v.* Bauchman, 8 Serg. & R. (Pa.) 336 (1822); Jones *v.* Spear, 21 Vt. 426 (1849). This rule, however, extends only to the minute details of practice, such as fixing the time of trial, the time for application for change of venue, the time for presenting or filing of complaints, pleadings, etc. In many of the cases this power had been given to the courts by statute so that the holdings are mere *dicta*. See Rooker *v.* Bruce, 171 Ind. 86, 85 N. E. 351 (1908). No case has been found where the court established a new rule of procedure.

Fenno *v.* Primrose, *supra*, the first case to hold that a court of law has inherent power to make a compulsory reference for preliminary hearing and upon which all the subsequent cases are based, was decided upon the principle enunciated in *In re* Peterson, the court citing as authority only one case, Davis *v.* St. Louis and S. F. Ry. Co., *supra*. There the court referred the case to an auditor to find the facts on the theory that such power existed at common law. This historical argument is clearly untenable (see note 6, *supra*), and the case was in fact overruled by REV. STAT., §§ 648, 649; 1918 COMP. STAT., §§ 1584, 1587, at the time Fenno *v.* Primrose was decided.

[16] See note 15, *supra*. *Cf.*, however, Judge Doe's decisions in New Hampshire in Lisbon *v.* Lyman, 49 N. H. 553, 582 (1870); Metcalf *v.* Gilmore, 59 N. H. 417, 433 (1879); Boody *v.* Watson, 64 N. H. 162, 172 (1886); Atty.-Gen. *v.* Taggart, 66 N. H. 362, 369 (1890).

[17] See Roscoe Pound, "Regulation of Procedure by Rules of Court," 10 ILL. L. REV. 163, 171.

[18] For a discussion of the arguments for and against the regulation of procedure by rules of court, see Roscoe Pound, "Some Principles of Procedural Reform," 4 ILL. L.

and will undoubtedly meet with the approval of writers and students of jurisprudence. The fact that courts in the past two centuries have been content to look to the legislature for new rules of practice and procedure should not prejudice their claim to the inherent power of making new rules when confronted by situations which cannot be adequately handled under existing procedural machinery. True, their acquiescence does lend color to the suggestion that the making of rules of procedure is a legislative function, and that, under the American theory of the separation of powers, the exercise of this power by courts is *ultra vires* and hence unconstitutional.[19] But "what constitutes judicial power within the meaning of the constitution is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution." [20] Indeed the real constitutional question would seem to be to what extent the legislature can control the details of practice and procedure in courts.[21] In view of the fact, however, that courts in the past have accepted such legislation as controlling, it is probably true that the sweeping language of the court in *In re Peterson* is largely nullified, especially in the code states. It is nevertheless to be hoped that courts will utilize this new weapon to simplify procedure and practice in proper cases and in so far as they are not so controlled.[22]

That a preliminary hearing before an auditor is an "appropriate instrument" for the performance of a court's duties seems too clear for argument. It has always been utilized in courts of equity[23] and is not without precedent in courts of law.[24] That such practice is "necessary" in cases involving complicated facts or accounts seems equally obvious. The volume of litigation arising under the present organization of society does not permit courts to devote their time to such cases until the groundless claims have been sifted from the legitimate, and the disputed issues have been moulded into compact form. The machinery of a law court is not fitted for the trial of such cases. It is ridiculous to speak of a trial by jury where twelve confused and bewildered jurors are left to flounder in a maze of contradictory facts.[25] In cases involving long or complicated accounts equity has taken jurisdiction on the theory that such cases are unsuited for trial by jury;[26] under present conditions

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REV. 388, 403–407. See also Manley O. Hudson, "The Proposed Regulation of Missouri Procedure by Rules of Court," 17 UNIV. OF MO. LAW BULLETIN, No. 31.

[19] See Pound, note 17, *supra*, 169.

[20] See State *v.* Harmon, 31 Oh. St. 250, 258 (1877). See 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 742.

[21] See Epstein *v.* State, 128 N. E. (Ind.) 353 (1920).

[22] The courts have been quick to take advantage of the decision in the principal case. See Plews *v.* Burrage, 266 Fed. 959, 960 (1920). *Quaere* whether the court did not carry the doctrine too far.

[23] The Heirs of P. F. Dubourg de St. Colombe *v.* United States, 7 Pet. (U. S.) 625 (1833).

[24] A reference by consent in an action at law has always been allowed. Heckers *v.* Fowler, 2 Wall. (U. S.) 123 (1864).

[25] See Craven *v.* Clark, *supra*, 960.

[26] In a few jurisdictions there must be mutual accounts. See C. C. Langdell, "A Brief Survey of Equity Jurisdiction," 3 HARV. L. REV. 237, 244. In either case it seems clear that in *In re* Peterson the plaintiff might have brought a bill in equity in the nature of an "equitable assumpsit" for an accounting; or that the defendant, had

much might be said for making such jurisdiction exclusive. But even in cases where no accounts are involved, so that the parties must necessarily resort to a court of law for relief, they should not be heard to complain if the court, weighing the inadequacy of the machinery of law courts and the necessity of giving time to other litigation against the desire to comply with the wishes of the litigants in a particular case, sees fit to refer the case to an auditor for a preliminary hearing.[27]

RECENT CASES

BANKRUPTCY — PREFERENCES — FULFILMENT OF CONTRACT WITH PURCHASER WHO HAS PAID IN ADVANCE. — The plaintiff contracted with the owner of a mill for the entire output of his mill for one year, and paid part of the price in advance. Six months later the owner was adjudicated a bankrupt. The value of the mill's output up to that time was less than the money already advanced by the plaintiff. The lower court ordered the trustee in bankruptcy to continue the contract, which was done. Later, the court ordered the plaintiff to pay again to the trustee the price already advanced to the bankrupt before the bankruptcy. *Held*, that this was error. *Grief Bros.* v. *Mullinix*, 45 A. B. R. 265.

For a discussion of the principles involved in this case, see NOTES, p. 309, *supra*.

BILLS OF LADING — EFFECT OF INTERSTATE COMMERCE ACTS UPON VALIDITY OF EXCHANGE BILL OF LADING ISSUED WITHOUT SURRENDER OF ORIGINAL. — The plaintiff is the *bona fide* purchaser of an exchange bill of lading issued by the defendant railroad without requiring the surrender of the original bill. The Interstate Commerce Acts, as amended, make it "unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person" and require every carrier to file with the Commission schedules showing "all privileges or facilities granted and any rules or regulations which in any wise affect rates or the value of service rendered." (24 STAT. AT L. 380, 34 STAT. AT L. 586.) The defendant had filed a regulation which provided that original bills of lading must be surrendered before exchange bills would be issued. The plaintiff sues the railroad for failure to deliver shipment. *Held*, that the plaintiff cannot recover. *Pioneer Trust Co.* v. *Nashville, C. & St. L. R. R. Co.*, 224 S. W. 109 (Mo.).

Whether an exchange bill of lading be issued without a surrender of the original or an original bill of lading be issued without receipt of the goods, a bill of lading is outstanding without any goods behind it. By the weight of authority at common law, a *bona fide* purchaser of such a bill of lading could not recover upon it from the carrier. *Grant* v. *Norway*, 10 C. B. 665. *Pollard* v. *Vinton*, 105 U. S. 7. See *Mo., etc. R. Co.* v. *Hutchings Co.*, 78 Kan. 758, 764, 767, 99 Pac. 230, 232, 233. But the better rule protected the *bona fide* purchaser of the bill of lading. See WILLISTON, SALES, § 419. The Uniform Bill of Lading Act adopts this rule. See DRAFT ACT COM'RS UNIFORM STATE LAWS,

he so desired, could have enjoined the suit at law and forced the plaintiff to resort to equity for relief. *Ibid.*, 243. In such case the federal court, sitting as a court of equity, could have made a compulsory reference for decision. See United States *v.* Wells, *supra*, 151.

[27] See Penno *v.* Primrose, *supra*, 806. In England compulsory reference for preliminary hearing is authorized by the Arbitration Act of 1889. See 52 & 53 VICT., c. 49, § 13.